

THOMAS A. HOGE)	
Claimant)	
)	
VS.)	
)	
CONCRETE SERVICE CO. INC.)	
Respondent)	Docket No. 251,937
)	
AND)	
)	
DEPOSITORS INSURANCE CO.)	
Insurance Carrier)	

Claimant appealed Administrative Law Judge Bruce E. Moore's Award dated April 24, 2001. The Board heard oral argument on November 13, 2001.

Robert R. Lee of Wichita, Kansas appeared for the claimant. James M. McVay of Great Bend, Kansas appeared for respondent and its insurance carrier.

The Board has considered the record and adopted the stipulations listed in the Award.

The Administrative Law Judge determined that as a result of the September 17, 1998 accident, claimant suffered a 5 percent task loss and a 24 percent wage loss which combined for a 14.5 percent work disability.

Claimant requested review and argues he is essentially and realistically unemployable and is entitled to an award of permanent total disability.

Respondent argues claimant is limited to his stipulated 10 percent functional impairment because the parties agreed to a vocational rehabilitation plan which would have returned claimant to a comparable wage with respondent. Respondent argues claimant did not make a good faith effort to complete the vocational rehabilitation retraining and accordingly the comparable wage claimant would have made upon completion of the retraining would limit claimant to his functional impairment. In the alternative, respondent argues that because of claimant's preexisting impairment he has only suffered an additional 3 percent task loss because of his work-related injury.

The sole issue raised on review to the Board is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Thomas A. Hoge was 53-years-old at the time of the regular hearing. He only went to his junior year in high school and received his GED while in the military. Claimant has a few college hours in law enforcement where he attended seminars on investigations and photography.

It is undisputed that claimant injured his low back during the course of his employment. The parties stipulated to an accident date of September 17, 1998. In the performance of his job duties as a truck driver the claimant would occasionally drive a ready-mix cement truck to deliver concrete. When claimant would lift the metal chutes used to dispense the concrete from the truck, he noted an increase in his low back symptoms. On approximately the stipulated accident date, the claimant noted an increase in low back complaints after lifting the metal chutes at work. The next day the pain radiated into claimant's legs and he sought treatment.

Claimant was treated conservatively with medications, physical therapy, decreased activity and epidural injections. However, the conservative treatment did not alleviate claimant's pain. On November 23, 1998, Dr. Ely Bartal performed an L5 laminectomy with L5-S1 foraminotomy and L5-S1 discectomy.

The surgery provided temporary relief, but by March 1999 claimant was experiencing recurrent severe back pain. An MRI on March 29, 1999, revealed epidural fibrosis at L5-S1. Epidural block injections were attempted without success. In July 1999, a trial dorsal column stimulator was inserted and in August 1999 a permanent dorsal

column stimulator was inserted. Although the dorsal column stimulator initially improved claimant's leg pain, nonetheless, claimant testified his back pain is now as severe as it was before surgery and extends into his left leg.

A Functional Capacity Evaluation (FCE) was performed on November 2, 1999. The FCE recommendations were light-medium work with regard to claimant's restrictions. Light-medium work allows one's lifting abilities to be 35 occasionally, 15 frequently and 7 constantly as defined by the Dictionary of Occupational Titles.

Respondent advised claimant that he could not return to work at his former job as a truck driver. However, the respondent offered to accommodate claimant's restrictions by placing him in a position as a dispatcher. The dispatcher position required some accounting and computer skills. It was agreed claimant could develop the necessary skills by enrolling in introductory computer and accounting courses at Barton County Community College.

A formal vocational rehabilitation plan was prepared and signed by the claimant on December 20, 1999. The plan provided respondent would pay the expenses for claimant to attend the computer and accounting classes at the college. Respondent additionally would pay claimant temporary total disability benefits while he attended college.

The claimant began classes on January 10, 2000, but stopped attending classes after a few weeks. Claimant had problems sitting through the classes as well as problems understanding the concepts of both the computer and accounting classes. Claimant testified he was not able to complete the vocational rehabilitation plan. Claimant advised Dale Westhoff, respondent's vice-president, that he could not continue with the vocational plan. Mr. Westhoff testified:

Q. To your knowledge what happened with the vocational plan itself?

A. He had come to me after classes started and said that he wasn't able to continue on with the class because he was in pain, didn't feel like he could focus on doing the homework and just couldn't keep it together enough to stay through the classes.

Q. Did he ever indicate to you in that conversation that you're talking about that he didn't have the intellectual ability to do the classes?

A. No.

Q. So it was simply where he complained that he had pain and therefore couldn't do the classes?

A. Yes.¹

Janice Hastert, vocational case manager, testified that when she checked with claimant on January 31, 2000, to see how things were going the claimant told her he had quit attending classes because of the combination of pain and emotional stress.

At the request of the parties' attorneys, claimant was examined by C. Reiff Brown, M.D., on April 13, 2000. Dr. Brown testified the claimant's examination revealed surgical scars posteriorly, one at L5-S1 and the other at L1-2 in the midline, which was where the dorsal column stimulator was placed. The third incision was at the anterior abdominal area which contained the power pack of the dorsal column stimulator.

Dr. Brown noted claimant's range of motion was 50 percent of what one would expect for a man of his age. Claimant was unable to toe/heel walk because of discomfort and weakness.

An MRI dated March 29, 1999, had been done with Gadolinium enhancement to detect the presence of scar tissue in the spinal canal and it revealed the previous desiccated areas, post-operative changes at L5-S1 and an extradural mass adjacent to the nerve root at that level on the left. The Gadolinium injection brought about the enhancement of that mass which indicated scar tissue and epidural fibrosis rather than a recurrent herniation of the disk.

Dr. Brown diagnosed a failure of surgical treatment due to the epidural fibrosis at L5-S1 on the left. He opined the claimant was having pressure on the nerve roots or the spinal cord in the area of the operation due to large amounts of scar tissue being formed.

Dr. Brown restricted the claimant from lifting above 35 pounds occasionally and 15 pounds frequently. Dr. Brown noted claimant should lift with the proper mechanics and should also avoid frequent bending and rotation more than 30 degrees as well as working in awkward positions. Dr. Brown further noted claimant can frequently sit, stand, walk and reach but it will be necessary for the claimant to perform these activities intermittently alternating them according to his need to do so. Lastly, the claimant should only occasionally bend, squat, kneel, crawl or climb.

Dr. Brown agreed the claimant would have difficulty finding a job in Great Bend due to the need to sit down, stand up or stop walking every so often plus the work restrictions placed upon him.

Philip R. Mills, M.D., evaluated the claimant on November 16, 2000, at the request of claimant's attorney. Dr. Mills noted the claimant's subjective complaints were compatible

¹Deposition of Dale Westhoff dated January 8, 2001, at 12.

with the objective findings and symptom magnification was not evident. The doctor diagnosed claimant with status post arachnoiditis with post laminectomy syndrome, status post L5 laminectomy with L5-S1 foraminotomy and L5-S1 discectomy for left L5-S1 herniated disk with left spondylolisthesis with a grade I isthmic slip, and status post placement of spinal cord stimulator.

Using the AMA Guides, Fourth Edition, Dr. Mills opined the claimant would have a 10 percent permanent partial impairment. Dr. Mills opined the claimant suffers from a 20 percent permanent partial impairment to the body as a whole based upon either model (routine use of the cane or DRE model with a lumbosacral Category IV). Dr. Mills testified based upon claimant's prior diagnosis, 50 percent of his total 20 percent impairment was preexisting.

Dr. Mills testified that given the claimant's impairment, age, and education that claimant was essentially unemployable. In response to a question regarding the results of the claimant's FCE the following colloquy occurred:

Q. What is it about Mr. Hoge's situation and his presentation that causes you to conclude that he is essentially and realistically unemployable, notwithstanding the results of the functional capacity evaluation that's been brought to your attention?

A. His underlying problem, I felt, was scarring. In my diagnosis I put arachnoiditis with post laminectomy syndrome. These are real problems. He's had spinal cord stimulation placement. He has a real chronic pain problem. In my experience, people that have genuine -- there's psychological factors among some people, but people such as Thomas Hoge that have a genuine testable physiologic problem such as this will have substantial difficulty in finding a job that will be able to meet their particular needs. On any one day they might be able to do certain things for a period of time, but in the active labor market you have to have somebody that day-in and day-out can do the job. I don't think that's true of this gentlemen [sic] and that's why I testified the way I did. I think we have a system called Social Security disability, he met their criteria, which is quite difficult to meet, so I think that's appropriate.²

Because Dr. Mills concluded claimant was unemployable he did not assign claimant any permanent work restrictions.

Jerry D. Hardin, a human resource consultant, interviewed the claimant on July 10, 2000. Mr. Hardin testified that on the assumption claimant would be able to find a job there

²Deposition of Philip R. Mills, M.D., dated January 17, 2001, at 37-38.

are positions in the area that would pay \$6 an hour. But Mr. Hardin opined that based upon claimant's education, training, experience and his restrictions, the claimant is realistically and essentially unemployable.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁵

The claimant argues he is permanently and totally disabled. K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, 19 Kan. App.2d 110, 872 P.2d 299 (1993), held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent." In Wardlow, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in Wardlow, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently and totally disabled.

Claimant testified he has severe back pain and can barely stand long enough to shave in the morning. Claimant further testified he has sharp pains shooting down his left leg between the times the stimulator works as well as a burning and numbing sensation in his toes. Claimant also has burning in the small of his back and pain in his hip. The claimant uses a cane to help him walk. Claimant is currently on Social Security disability.

³K.S.A. 1998 Supp. 44-501(a).

⁴K.S.A. 1998 Supp. 44-508(g).

⁵Tovar v. IBP, Inc., 15 Kan. App.2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

Claimant noted that he would like to find an office type job but admitted he didn't have the training and his failure to complete the proposed vocational plan demonstrates the difficulty claimant would encounter in attempting to obtain new vocational skills.

The Administrative Law Judge concluded claimant had not made a good faith effort to complete the planned vocational retraining. The Judge noted the claimant had the intellectual capacity to complete the introductory level courses and had never complained of any pain to his instructors. The Judge further noted claimant had demonstrated the ability to sit for approximately 50 minutes at his examination with Dr. Mills which was approximately the same time as a class session. Lastly, the Judge commented that Dr. Brown noted claimant had indicated he wanted to apply for Social Security disability and retire which the Judge concluded indicated claimant lacked motivation to complete the course work and simply wanted to retire.

The Board disagrees with the Judge's analysis. The Administrative Law Judge relies on claimant's statement to Dr. Brown that he intended to apply for Social Security disability as an indication claimant lacked motivation to complete the accounting and computer classes. It must be noted that claimant did not make those statements until after his unsuccessful attempt to go to school. Dr. Brown's examination was on April 13, 2000, some three months after claimant's unsuccessful attempt to go to school. Based on the ongoing complaints of pain, it is not surprising that claimant would consider seeking Social Security disability after the failed attempt at retraining.

The Board further notes the fact that on one occasion the claimant sat without complaint during his examination with Dr. Mills does not indicate claimant's complaints of pain were not real. Both doctors diagnosed claimant with a failed back surgery syndrome. Dr. Mills specifically concluded claimant was not a symptom magnifier and claimant's subjective complaints of pain corresponded with the objective medical findings. Dr. Brown's examination revealed a marked decrease in range of motion and the inability to perform the heel/toe walking due to pain and weakness. The MRI testing revealed scarring at the surgical site that was impinging on the nerve. Claimant had a dorsal column stimulator permanently placed to help alleviate his pain. Lastly, as Dr. Mills testified, on any one day claimant might be able to do certain activities for a period of time. The Board is persuaded claimant's condition causes him significant low back and leg pain.

The Board concludes claimant made a good faith effort to complete the computer and accounting courses but simply could not finish the retraining because of his ongoing pain. Dr. Mills and Mr. Hardin, the vocational expert, both opined claimant is essentially and realistically unemployable. Dr. Brown agreed it would be very difficult for claimant to obtain employment because of the necessity that he frequently change position. The combination of the serious and permanent nature of claimant's injuries, his lack of training, his being in constant pain and the necessity of constantly changing body positions combine to render claimant essentially and realistically incapable of engaging in substantial and gainful employment. The Board finds Dr. Mills' opinion the most persuasive and concludes

the greater weight of the evidence establishes that claimant's present problems are directly caused by his work-related injuries and he is now totally disabled from substantial, gainful employment. Accordingly, the Administrative Law Judge's Award is modified to reflect claimant is permanently and totally disabled.

The parties stipulated at Regular Hearing that claimant had a preexisting functional impairment of 12.5 percent. Accordingly, the Board concludes the award should be reduced for the 12.5 percent preexisting impairment. K.S.A. 44-501(c) provides: "Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." The Board has held that this provision applies to a permanent total disability award.⁶

A permanent total disability pays benefits of \$125,000 at a weekly compensation rate based on the calculation set forth in K.S.A. 44-510c. As a result, one cannot deduct the percentage of impairment in exactly the same way one would with a permanent partial disability. One cannot deduct the percentage of preexisting disability from the percentage of disability found. The Board concludes, however, that the logical alternative is to deduct the number of weeks represented by the preexisting disability, in this case 51.88 weeks for a 12.5 percent disability, from the number of weeks of benefits to be paid for the permanent total disability. The deduction is accomplished by calculating the number of weeks of benefits to be paid for the temporary and permanent total disability and then reducing that number by the number of weeks that would be paid for the preexisting disability.

In this case, the permanent total disability would be paid at \$366 per week for 39.43 weeks of temporary total disability and 302.10 weeks of permanent total disability for a total of \$125,000. With the 51.88 weeks deducted, the award in this case is for 39.43 weeks of temporary total disability at \$366 per week and 250.22 weeks ($302.10 - 51.88 = 250.22$) of permanent total disability at \$366 per week for a total award of \$91,580.52.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that the Award entered by Administrative Law Judge Bruce E. Moore on April 24, 2001, should be, and the same is hereby, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas A. Hoge, and against the respondent, Concrete Service Co. Inc., and its insurance carrier, Depositors Insurance Company, for an accidental injury which occurred September 17,

⁶Horton v. Bob's Super Saver Country Mart and Cadwell's Country Mart, WCAB Docket Nos. 220,167 and 220,168 (April 1999).

1998, for 250.22 weeks at \$366 per week, or \$91,580.52, of combined temporary total and permanent total disability.

As of August 30, 2002, there is due and owing claimant 39.43 weeks of temporary total disability compensation at the rate of \$366 per week or \$14,431.38, followed by 166.86 weeks of permanent total disability compensation at the rate of \$366 per week in the sum of \$61,070.76, for a total of \$75,502.14, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$16,078.38 is to be paid at the rate of \$366 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
James M. McVay, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation